BIBL 65/90

Case No 604/88
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

LUCREZIA TANDOKAZI MADYOSI	First Appellant (1st Plaintiff)
EUNICE NOMSAKAZO BISHO	Second Appellant (2nd Plaintiff)
and	
S A EAGLE INSURANCE CO LTD	Respondent

CORAM: HOEXTER, E M GROSSKOPF, MILNE JJA et NICHOLAS, NIENABER AJJA

DATE OF HEARING: 22 May 1990

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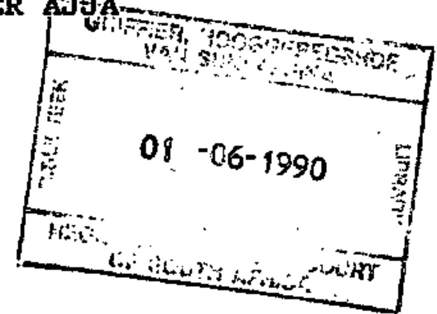

J U D G M E N T

MILNE JA:/....

MILNE JA:

The appellants were passengers in a motor bus when it left the road and overturned. They suffered injuries in this accident and sued the respondent for damages as the insurer of the bus in terms of s 22(1)(a)(i) of the Compulsory Motor Vehicle Insurance Act, No 56 of 1972. The trial court held that the appellants had not established that the driver of the bus was negligent in any of the respects alleged and dismissed the action with costs, but granted leave to appeal to this court. The judgment is reported as Madyosi & Ano v S A Eagle Insurance Co Ltd 1989(3) SA 178 (C) and it is accordingly unnecessary to set out the facts in detail.

The evidence establishes that the bus left the road and overturned after the left front tyre burst. The

main thrust of the appellant's argument was that the bursting of the tyre was a "neutral fact" and that the <u>prima facie</u> case of negligence which arose from proof of the fact that the bus had left the road and overturned therefore remained undisturbed. This was the line of reasoning elaborated in <u>Star Motors v Swart</u> 1968(3) SA 60 (T). In that case the cause of the accident was the sudden locking of the brake on the right front wheel of the defendant's car. It was held that the existence of a defective brake was not by itself inconsistent with negligence and, at p 62C-D, that

> "In order to neutralise the inference of negligence, the defendant had to go further and prove that the defect in the brake was latent (i.e. that it was unknown to the defendant and that it was not discoverable by the exercise of ordinary skill and care). Then he would have presented a proved explanation (inconsistent with negligence on his part) as likely as the supposition arising from the inference in favour of the plaintiff."

For the respondent it was submitted, relying on _Jithoo v Booth_ 1971(4) SA 560 (N), that a failure on the part of the driver to inspect and maintain the tyres had not been pleaded and was accordingly not an issue in the trial. This point was never raised in the _Star Motors_ case _supra_ and, indeed, it seems that it could not have been successfully argued since the whole issue of failure to maintain the brakes had been fully canvassed at the trial.

In our law the maxim _res ipsa loquitur_ has no bearing on the incidence of proof on the pleadings, and it is invoked where the only known facts, relating to negligence, are those of the occurrence itself.

> "At the end of the case the court has to decide whether, on all of the evidence and the probabilities and the inferences the plaintiff has discharged the _onus_ of proof on the pleadings on a preponderance of probabilities, just as the court would do in any other case concerning negligence. In this final analysis, the court does not adopt

> the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation."

Sardi & Others v Standard & General Insurance Co Ltd 1977(3) SA 776 (A) at D-E and G-H.

See also Arthur v Bezuidenhout & Mieny 1962(2) SA 566 (A) at 574B where Ogilvie-Thompson JA said:

> "There is, in my opinion, only one enquiry, namely: has the plaintiff having regard to all the evidence in the case discharged the onus of proving, on a balance of probabilities, the negligence he has averred against the defendant?".

The negligence which the appellants averred against the respondent was only against the driver and not against the owner of the bus and was particularized as follows:

"5.1 He drove motor vehicle XN 1427 at an

excessive speed in the circumstances;

5.2 He failed to keep motor vehicle XN 1427 under proper control;

5.3 He failed to avoid the collision when, by the exercise of reasonable care, he could and should have done so."

It was somewhat tentatively suggested that para 5.2 was capable of embracing an allegation that the driver had failed to take reasonable steps to ensure that the tyres of the bus were in a safe condition. I do not think this is correct. The words in their ordinary meaning relate to the manner of driving the vehicle and not to its maintenance nor, in the circumstances of this case, was it the intention of the pleader to convey anything else. The respondent's counsel consistently adopted the attitude both at the pleading stage and during the trial that the issue of failure to maintain was not part of the appellant's case <u>as pleaded</u> and the appellants' counsel did not contend to the contrary. What he did submit at one stage was that the

question of the driver's knowledge as to the state of his tyres was relevant to the question of whether he drove at an excessive speed.

The case must therefore be decided on the basis that the appellants did not allege a failure to maintain the tyres of the bus either against the driver or the owner.

I have some doubt whether the maxim _res ipsa loquitur_ does apply here. It is not the case that the only known facts relating to negligence consist of the occurrence itself. It is a known fact that the bus left the road and overturned because the tyre burst. The bursting of the tyre is not a neutral fact in relation to the negligence pleaded by the appellants. It explains why the bus left the road and overturned. True, it is not by itself inconsistent with a negligent failure to maintain the tyres but no such

negligence was pleaded. Had the only evidence relating to negligence been that the bus left the road and overturned that would, in the absence of anything else, have justified an inference that the driver failed to keep the bus under proper control. The fact that the tyre burst however prevents that inference being drawn from the mere fact of the occurrence. Some reliance was sought to be placed on various dicta in Berkway v South Wales Transport Co Ltd [1950] 1 All E.R. 392. One must bear in mind, however, that in English law the maxim is regarded as "as a rule of evidence affecting onus." See Lord Normand at p 399 in fin. That is not the position in our law and one must accordingly approach the English decisions dealing with this subject with some caution. Quite apart from that, however, the point now under consideration simply did not arise in the Berkway case because the negligence alleged against the defendant included "want of supervision" of the tyres of the

the omnibus. See p 394C.

Where the maxim does apply it alters neither the incidence of the onus nor the rules of pleading. If there is no onus on the defendant to show an absence of negligence where res ipsa loquitur does apply I have difficulty in seeing how it can be contended that he must, in circumstances like those in the present case, plead not only the fact of the tyre bursting but also the facts to show that this was not due to negligence on his part. The appellants' counsel referred to the fact that it appears to be a well-established practice for the defendant to plead expressly a mechanical failure such as failure of brakes, burst tyres etc. The reason for this practice is not that the defendant bears anything approaching an onus. Even if, strictly speaking, it is not necessary for a party to amplify a denial he will frequently be well advised to do so

to avoid his opponent being taken by surprise and to avoid being mulcted in orders for costs consequent upon that situation arising. See Mordt N O v Union Government 1938 TPD 589 at 597. Rule 18(4) of the Uniform Rules of Court furthermore, requires every pleading to contain a clear and concise statement of the material facts upon which (in the case of a defendant) he relies for his defence. It does not follow from this that he must then plead a want of negligence in a particular that has not been alleged.

It follows in my view that the learned judge *a quo* correctly approached the question of *onus* and correctly assessed the issues before him on the pleadings.

It was submitted, in the alternative, that the driver was negligent in not keeping the bus on the tarred surface after the tyre had burst. He managed to do so for a

distance of some 164m but when the bus had slowed down virtually to a standstill it left the tar and overturned. The driver attributed this to the fact that the passengers rushed in a panic towards the door of the bus which was situated at the front of the bus at the left hand side. The learned judge a quo rejected this explanation as improbable because he found that the bus was carrying a few more passengers than its certificate permitted and thus the aisle would have been blocked with passengers. It does not necessarily follow from the fact that the aisle was blocked with passengers that this explanation must be rejected. Those passengers may themselves have formed part of the group that rushed in a panic towards the door of the bus. There was, in any event, no expert evidence on the effect of the bus continuing to move forward with the left front wheel acting, as it were, as a brake and the trial court came to the conclusion that the reason for the bus having overturned

where it did "remains a puzzle". I agree. The evidence does not justify a finding that a reasonably skilful driver could have prevented the bus from overturning after the tyre had burst. Nor does it justify the conclusion (advanced as a last ditch stand on behalf of the appellants) that as the bus was coming to a stop the driver deliberately drove it off the tarmac.

The appeal is accordingly dismissed with costs.

A J MILNE
Judge of Appeal

HOEXTER JA]
E M GROSSKOPF JA] CONCUR
NICHOLAS AJA]
NIENABER AJA]